YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by THE YALE LAW JOURNAL COMPANY, INC. P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

THE EFFECT OF RESTRICTIONS ON THE ALIENABILITY OF MONEY CLAIMS.

It is now clearly established that ordinary choses in action are alienable.[1] Recently a new difficulty has confronted the courts in those cases where the obligor has attempted *ab initio* to deprive the obligee of power to assign. The most recent instance of this limited class of cases is to be found in the very important decision in *Portuguese-American Bank of San Francisco v. Welles*.[2] A contract between the city and a contractor provided that neither the contract nor the right to moneys due thereunder should be assignable without the consent of the board of public

[1] For an exhaustive treatment of this topic see the article of Professor Walter Wheeler Cook, The Alienability of Choses in Action (1916) 29 HARV. L. REV. 816-837.

[2] (1916) 37 Sup. Ct. Rep. 3.

works.[2a] The consent of the board was not obtained, although the city made no objection to the assignment, and paid the money into court. A subcontractor claims that the assignment is invalid and, hence, that he can attach the claim as an asset of the assignor. The court held that the assignment operated to give the bank a complete right to the money due, notwithstanding the restriction.

We venture to submit that the reasoning of Mr. Justice Holmes in the decision is inadequate to justify the result reached. The Justice draws the analogy between the sale of a horse and the assignment of a money claim. He says: "When a man sells a horse what he does from the point of view of the law is to transfer a right." An obligation, however, cannot be reduced to a mere "right" together with a corresponding duty. There are many companion jural relations forming an aggregate, or bundle, of actual and potential rights, privileges, powers, and immunities.[3]

[2a] A clear distinction exists between an assignment that merely substitutes a new creditor, and an assignment that involves also a performance by the assignee in place of performance by the original obligee as the fulfilment of a condition precedent to the enforcement of the claim assigned. The former only is being considered here.

[3] Professor Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16, 28.

The true reason for the inalienability of choses in action at common law was the difficulty early jurists had in conceiving jural relations apart from tangible objects. Pollock & Maitland say in *History of English Law* (2d ed. 1905), Vol. II, p. 226: "Ancient German law, like ancient Roman law, sees great difficulties in the way of an assignment of a debt or other benefit of a contract . . . men do not see how there can be a transfer of a right unless that right is embodied in some corporeal thing." Quoted by Professor Hohfeld, 23 YALE LAW JOURNAL, 16, 21.

Professor Ames in The Disseisin of Chattels (1890) 3 HARV. L. REV. 339, *contra,* quotes and approves Spence's theory as set forth in the latter's work on *Equity Jurisprudence,* 850: "But in regard to choses in action, as the same doctrine has been adopted in every other state in Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else was not also the reason for its introduction in this country; namely, that the credit being a *personal right* of the creditor, the debtor being obliged toward that person could not by a transfer of the credit, which was not an act of his, become obliged towards another."

We submit that two weaknesses exist in Spence's theory adopted by Professor Ames. First, negatively, it does not explain the tort case. It is hardly conceivable that ancient law would be so tender of a tort feasor. No adequate reason can be found for holding that a tort gives rise to purely personal jural relations, as where A injures B's land. Secondly and affirmatively, we have an adequate and valid reason set forth by Maitland,

The so-called "transfer" of title to a chose in possession is not a simple, but a complex thing. What really transpires is the extinguishment of certain rights, privileges, powers, and immunities, actual and potential, in the vendor, and the creation of corresponding rights, etc., in the vendee.[4]

In the principal case the money claim which was assigned differs from the ordinary chose in action, for here *ab initio* the obligor attempted to create an obligation which, as an aggregate of jural relations, does not include the power to alienate.

To determine the correct analogy, let us consider three type cases:

(1) A creates a money obligation in favor of B, with no attempt to deprive B of the power to alienate.

(2) A creates a money obligation in favor of B, with no restriction on its alienability. Then B assigns to C with the attempted restriction that C shall have no power to make further assignment.

(3) A creates a money obligation in favor of B, with a stipulation *ab initio* that B shall not have the power to alienate.

The principal case belongs to general type (3), although the disability was not absolute, since the contractor could assign his claim with the consent of the board of public works. To make the restriction on the assignment of a money claim precisely analogous to a restriction on the alienability of a chose in possession, as the horse in Justice Holmes' illustration, B, the owner of the assignable claim, would have to attempt the restriction of the power to assign on the part of *his* assignee, C, as in case (2). We submit that the analogy is not a perfect one for the situation in the principal case.

Turning to a consideration of case number (1), we find that the common law developed a method of evading the rule against assignability. Use was made of the device of "power of attorney," enabling the assignee to obtain relief in common law pro-

---

in The Mystery of Seisin (1886) 2 LAW QUART. REV. 495: "There is a contrast more ancient than that between *jus in rem* and *jus in personam;* namely, that between right and thing. Of maintenance there is, I believe, no word in Bracton's book, but that there can be no *donatio* without *traditio* is for him a rule so obvious, so natural that it needs no explanation." See also Pollock & Maitland, *History of English Law* (2d ed. 1905), Vol. II, p. 226, *supra.*

[4] 23 YALE LAW JOURNAL, 16, 24, 45, 50, note 100.

ceedings by suing in the name of the assignor.[5] In the absence of any stipulation to the contrary, the contract to pay money can now be freely assigned by the creditor.[6]

In case (2) it is arguable that the "horse" analogy might control in such a situation. It has been deemed contrary to public policy to allow restraints on the alienation of ordinary chattels.[7]

Case (3) presents a situation where *ab initio,* one of the aggregate of jural relations which usually compose an obligation, namely, the power to alienate, is sought to be excluded. The question whether or not A's intention should prevail should rest fundamentally on considerations of public policy. The courts which have only common law principles to guide them answer this question in the affirmative.[8] But, notwithstanding the fact that some courts will not effectuate B's assignment at law, equity will cause B to hold the claim as constructive trustee for C.[9]

---

[5] For this evolution in the common law, see Professor Walter Wheeler Cook, (1916) 29 HARV. L. REV. 816, 842-834.

[6] *Delaware County v. Diebold Safe Co.* (1889) 133 U. S. 473, 488. See in accord, Smith J., in *Colbourn v. W. W. Rossiter* (1818) 2 Conn. 503, 508: "I speak not of chancery, merely; it is the same law. There is no hostility between different jurisdictions on this subject. It is a well settled principle of the common law of Connecticut that the property in a chose in action, may be assigned, and the courts of law have long since recognized the property in the assignee as fully as courts of chancery."

The situation is covered in the code states by requiring all actions to be brought by the real party in interest. In other states there are usually express statutes. A typical example is the Illinois Practice Act (1913) Rev. St. ch. 110 ¶ 18.

[7] *American and English Encyclopaedia of Law,* Vol. XXIV, pp. 863, 864. To hold that an ordinary chose in action cannot be deprived of its assignability, because of public policy, indicates a vast change from the ancient rule that a chose in action was not assignable at all.

[8] *Tabler v. Sheffield Land, Iron & Coal Co.* (1887) 79 Ala. 377 (Labor tickets marked non-transferable were held not to support an action by the assignee in his own name). See also *Devlin v. Mayor* (1877) 63 N. Y. 8, 17; *Murphy v. City of Plattesmouth* (1900) 78 Neb. 163, (A restriction was held binding); *Staples v. Somerville* (1900) 176 Mass. 237; *Delaware Co. v. Diebold Safe Co.* (1889) 133 U. S. 473, 488. It should be noted that in several of these cases the language of the agreement seemingly affects only the privilege of exercising the power of assignment. The distinction between the case where the obligee has no power at all to assign, and the case where he has power and is merely under an obligation not to exercise it, is nowhere taken in the cases. For a full explanation of this distinction, see (1915) 24 YALE LAW JOURNAL, 590, 591.

[9] *Staples v. Somerville, supra.* Here C was entitled to money as against assignee in insolvency of A. See also *Fortunato v. Patten* (1895) 147 N. Y. 277.

The obvious purpose of statutes would seem to be merely to confirm the change in the rule preventing alienability of choses in action. Upon this theory, several courts hold that the statutory provisions do not invalidate any agreement that the parties may have made in regard to assignment. In such jurisdictions the stipulation in case (3) would be upheld.[10] Some courts, however hold that all attempts to make money claims non-assignable are unavailing.[11] We venture to submit, however, that they are not led to this conclusion through any analogy drawn from the assignment of choses in possession as, for instance, the "horse" analogy in the principal case. The principal case, as already indicated, is of type (3). The analogy of the chose in possession applies only to the type case (2). If, therefore, the decisions which hold restrictions are not binding are to be supported, it would seem to be on special grounds of public policy which enter into the very birth, or creation, of this obligation as distinguished from case (2), which applies only to property already in existence.[12]

G. S., JR.

COPIES OF A PRINTED CRIMINAL LIBEL AS SEPARATE OFFENSES.

An interesting and difficult question is presented when copies of a newspaper containing a criminal libel are circulated in a jurisdiction other than that of the printing. This point was adjudi-

[10] *Barringer v. Bes Line Construction Co.* (1910) 23 Okl. 131; *Butler v. San Francisco Gas and Electric Co.* (1913) 16 Cal. App. Dec. 946. See an interesting note on this case by Professor O. K. McMurray in (1913) 1 CAL. L. REV. 471. The court held that a provision in the contract that it should not be assigned renders an assignment thereof void. Compare, however, s. c. on appeal, 168 Cal. 32, 41. See also *La Rue v. Groezinger* (1890) 84 Cal. 281.

[11] *Bewick Lumber Co. v. Hall* (1894) 94 Ga. 539 (Credit check marked "not-transferable," held to be assignable. Here a code provision regulated the matter). *Bank of United States v. Public Bank of New York City* (1915) 151 N. Y. S. 26. A comment in 24 YALE LAW JOURNAL 590-594 gives a somewhat detailed analysis of the problems in this case. The court held that a rule of the bank requiring the depositor to appear in person to withdraw his account was a reasonable one as regards the depositor; but that it would not justify the refusal of the bank to pay the assignee, for the reason that the bank is a debtor and "cannot make rules and regulations which will limit the right to assign the debt."

[12] The statutes have only added to the extent of the power that the creditor was given at common law. The power of assignment could be

cated in the recent cse of *State v. Moore*.[1] In this case an alleged libellous article appeared in a newspaper edited and printed in parish A, but circulated widely in parish B. The defendant, the proprietor of the paper, was indicted by the grand jury of parish B. The Supreme Court of Louisiana, Chief Justice Monroe dissenting, sustained a plea to the jurisdiction on the ground that if there was any offense committed it was in parish A.

The Louisiana constitution[2] guarantees that all criminal trials shall take place in the parish in which the offense was committed, and the revised statutes[3] provide that all crimes, offenses, and

---

contracted away at common law, and whether or not the power given by the statutes can be contracted away, must rest upon a true interpretation of the statutes upon grounds of public policy. The arguments in favor of allowing a stipulation similar to the one in the principal case to prevail are briefly: (a) A money claim being an intangible *res* from its creation, the grounds are much weaker for invoking public policy to prevent the restriction of assignability. (b) Freedom of contract is of great importance to society. On the other hand, the reasons for a strict or narrow construction of the statutes are: (a) A money claim being "a courier without luggage," it is strongly urged that no impediment should be placed upon this power of assignment. Subsequent takers should not be put on notice of any secret agreements between assignor and debtor. (b) The law might vest the creditor with a naked power to assign in cases where the assignee had no notice, as in the case of an agent whose agency has been revoked; but the difficulty here arises that the statutes make all money claims either assignable or non-assignable. In the absence of specific language in the statutes invalidating stipulations similar to the one in the principal case, on principle, a money claim can be made non-assignable. Whether the courts will thus contrue the statutes is a matter which will be determined more or less by their views of public policy as above indicated.

The German Civil Code, sec. 399, provides that the power of assignment may be excluded by agreement.

[1] (1916) 72 So. (La.) 965.

[2] Art. 9: "All trials shall take place in the parish in which the offense was committed."

[3] Sec. 804: "Whoever shall maliciously defame any person by making, writing, publishing, or causing to be published, any manner of libel, shall on conviction thereof, suffer fine or imprisonment, or both, at the discretion of the court."

Sec. 976: "All crimes, offenses and misdemeanors shall be taken, intended and construed, according to and in conformity with the common law of England; and the forms of indictment, the method of trial the rules of evidence, and all other proceedings whatsoever in the prosecution of crimes, offenses and misdemeanors . . . shall be according to the common law unless otherwise provided."